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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34540

THE COLUMBUS & OHIO RIVER RAIL ROAD COMPANY–
ACQUISITION AND OPERATION EXEMPTION–RAIL LINES OF CSX
TRANSPORTATION, INC.

Decided: November 17, 2005

We are denying petitions filed by the Brotherhood of Locomotive Engineers & Trainmen (BLET) and the United Transportation Union (UTU) (jointly, petitioners) seeking to revoke the exemption authorized in this proceeding.

BACKGROUND

By notice of exemption published in the Federal Register on October 20, 2004 (69 FR 61702-03), and served on October 21, 2004, and by supplemental notice served and published on December 20, 2004 (69 FR 76029-30), the Columbus & Ohio River Rail Road Company (CUOH), a Class III rail carrier and subsidiary of Summit View, Inc. (Summit View), was authorized to acquire from CSX Transportation, Inc. (CSXT) and operate approximately 120.35 miles of rail line¹ in Franklin, Licking, Knox, Muskingum, and Guernsey Counties, OH (collectively, the Lines). CUOH is operated as part of the Ohio Central Railroad System (OHCR), which is controlled by Summit View, a noncarrier holding company, which also controls others carriers, including Ohio Southern Railroad, Incorporated (OSRR) and Ohio Central Railroad, Incorporated (OCRR).

More specifically, CUOH was authorized to: (1) purchase the 38.2-mile C&N Subdivision between Columbus, milepost BP 137.0, and Newark, milepost BP 100.6, and between milepost BBW 0.0 and milepost BBW 1.8 in Newark; and (2) lease approximately

¹ The supplemental notice increased the amount of rail line CUOH proposed to acquire by a total of 6.35 miles from approximately 114 miles.

82.15 miles, consisting of (a) the Central Ohio Subdivision between Cambridge, milepost BP 49.49, and Newark, milepost BP 100.6, and between Cambridge, milepost BPB 0.0, and Byesville, milepost 5.14, and (b) the Lake Erie Subdivision between Newark, milepost BQ 0.0, and Mt. Vernon, milepost BQ 25.9. The transaction also included approximately 1.5 miles of incidental trackage rights assigned by CSXT to CUOH over a line of OSRR between milepost 16.7 and milepost 18.2 in Zanesville. Prior to this transaction, CUOH and OCRR interchanged traffic at Morgan Run (Coshocton), OH. Following this transaction, CUOH and OCRR will interchange traffic at both Coshocton and Zanesville. The exemption, as supplemented, became effective on November 4, 2004.

Prior to this transaction, CSXT owned a 50% interest in the C&N Subdivision, with the State of Ohio owning the remaining 50% interest. CUOH and CSXT also both held operating rights over the C&N Subdivision. See Caprail I—Acquisition Exemption—Consolidated Rail Corporation, Finance Docket No. 31961 (Sub-No. 1), et al. (ICC served Jan. 15, 1992). Through this transaction, CUOH acquired CSXT's 50% interest in the C&N Subdivision and became the sole operator of that segment, and, through the lease, became the sole operator of the Central Ohio Subdivision and the Lake Erie Subdivision.

On September 13, 2004, BLET filed a protest, asking the Board to reject the exemption notice² and a notice filed in Indiana & Ohio Central Railroad, Inc.—Acquisition and Operation Exemption—CSX Transportation, Inc., STB Finance Docket No. 34536 (STB served Oct. 1, 2004) (IOCR Exemption), for another rail short line to lease and operate approximately 107 miles of CSXT's rail line between NA Tower, OH, and Oakley, OH, and between Oakley and Columbus, OH. UTU filed a petition to revoke the exemption on September 15, 2004, seeking relief identical to that sought by BLET for both the notice to be filed by CUOH and the notice filed in IOCR Exemption. UTU filed an amended petition to revoke on September 24, 2004,³ the date that CUOH first filed its notice, and another petition to revoke on October 22, 2004. UTU also sought discovery from CUOH to obtain copies of all leases and other written arrangements between and among CUOH, CSXT, and the State of Ohio relating to the transaction. On October 19 and 28, 2004, CUOH replied to the petitioners' filings. On November 16, 2004, UTU filed a motion to compel CUOH to produce the materials sought by discovery. CUOH responded on December 6, 2004.

² Because the exemption has become effective, we will treat BLET's filing as a petition to revoke the exemption.

³ On September 30, 2004, UTU certified that it served a copy of its pleadings upon CUOH.

Following service and publication of CUOH's second notice of exemption, UTU filed a supplemental petition to revoke on January 25, 2005, and a renewed motion to compel discovery on January 27, 2005. CUOH replied in opposition to each of these filings on February 7, 2005.

In a decision served on February 22, 2005, the Board instituted a proceeding to consider the issues raised by the petitioners. The decision also granted UTU's motion to compel, directed CUOH to produce the material sought through discovery, and set a procedural schedule for UTU's supplemental filing and CUOH's reply. UTU filed its supplemental petition to revoke on March 21, 2005.⁴ CSXT and CUOH responded on April 5, 2005.

POSITIONS OF THE PARTIES

In their initial filings, petitioners claim that the transaction is part of CSXT's program to dispose of over 3,500 miles of track through small transactions without Board review in a single proceeding under 49 U.S.C. 11323-24. They contend that the subject transaction has regional or national transportation significance and that the Board should consider it under the procedures in 49 U.S.C. 11325(d), pointing out that, as a result of this transaction and another proposal in IOCR Exemption, CSXT will discontinue service in a well-populated area of Ohio.⁵

Petitioners contend that the Board cannot determine from the limited amount of information required by the class exemption procedures in 49 CFR 1150.41 whether this is an arm's-length transaction that carries out the rail transportation policy (RTP) in 49 U.S.C. 10101. They point to the policy directive in 49 U.S.C. 10101(11) that the Board's regulation encourage fair wages and safe and suitable working conditions. Petitioners state that they are also concerned that CUOH could use the abandonment rules that have been proposed by a group of short line and regional carriers in STB Ex Parte No. 647, Class Exemption for Expedited Abandonment Procedure for Class II and III Railroads, notice served August 13, 2003, to expedite abandonment of the Lines. Petitioners also assert that the transaction was not motivated by a desire to realize legitimate business goals, and that CUOH was not a logical entity to be chosen as the operator.

⁴ With its supplemental petition, UTU submitted copies of various agreements entered into by CSXT and CUOH relating to the transaction, including the Land and Track Lease Agreement, the Purchase and Sale Agreement, and the Freight Operating Agreement. UTU filed full copies of the agreements under seal pursuant to a protective order served on March 9, 2005.

⁵ As noted, petitioners have raised the same or similar issues in IOCR Exemption. The Board denied the petitions to revoke by BLET and UTU in that proceeding by decision served on August 23, 2005.

In its supplemental petition, UTU also contends that the transaction will enable CSXT to evade obligations in its collective bargaining agreements by moving a number of jobs to CUOH, a nonunion carrier. UTU asserts further that the transaction is similar to a transaction that was disallowed in Sagamore National Corporation–Acquisition and Operation Exemption–Lines of Indiana Hi-Rail Corporation, Finance Docket No. 32523 et al. (ICC served Oct. 28, 1994) (Sagamore).

UTU asserts that the transaction agreements will enable CSXT to maintain significant control over CUOH's operation of the track and the property. UTU notes that the Lease and Purchase Agreement provides for CUOH to lease the land from CSXT and purchase the track and improvements, and it details CSXT's ownership rights as well as CUOH's obligations and limitations for using the property. According to UTU, the agreement precludes CUOH from granting trackage rights, hauling rights, or any other rail operational rights over the track to another carrier or third party without CSXT's consent; grants CSXT the right to inspect the land and buildings at any time; requires that CUOH obtain CSXT's consent to use the line as collateral for public funding; limits the assignment of the lease; requires that CUOH obtain insurance to protect CSXT's interest in the property; grants CSXT the right to monitor and approve the conduct of all environmental procedures by CUOH; and precludes CUOH from assigning the agreement without CSXT's consent. UTU notes that CSXT will also retain rentals, fees or other payments on portions of the property that does not interfere with CUOH's operations.

UTU cites as another indication of CSXT control the fact that the Freight Operating Agreement permits CSXT to audit CUOH's records; makes CSXT responsible for billing of freight charges and related administrative functions; and requires CUOH to adopt and participate in designated CSXT tariffs. UTU also notes that CSXT will be the primary source of supply for freight cars for CUOH, and that CUOH will be limited in where and how these cars may flow. Further, according to UTU, the railroads' interchange agreement requires that CUOH obtain insurance naming CSXT as beneficiary, and precludes CUOH from performing any local freight service on the designated interchange tracks or accessing the tracks without CSXT's authority.

In response, CUOH states that it is a Class III railroad operating in Ohio and that it has properly invoked the exemption procedures for acquisitions by carriers prescribed in 49 CFR 1150, subpart E. CUOH asserts that its notice of exemption contains all of the information required by the Board's regulations at 49 CFR 1150.41, et seq., and that petitioners have not shown that the notice fails to comply with the Board's requirements.

CUOH notes that it certified to the Board on August 30, 2004, that it had complied with the requirements of 49 CFR 1150.42(e), providing for notice to employees and their labor unions on the affected lines. CUOH states that it notified CSXT employees that it expected to hire six operating employees (train and engine service) and three other employees to perform maintenance-of-way and other functions.

CUOH states further that petitioners have failed to offer any explanation of the manner in which the exemption would be inconsistent with the RTP. CUOH points out that CSXT and it are independent entities with no corporate ties, and that CUOH has every interest in negotiating the most favorable deal possible for itself and in competing vigorously to provide the best service to its customers. CUOH explains that CSXT selected it as the winning bidder to acquire and operate the Lines and that it negotiated the necessary agreements at arm's length with CSXT.

CUOH disputes UTU's assertion that the transaction resembles the sham transaction addressed in Sagamore. CUOH states that it is a subsidiary of Summit View with no corporate ties to CSXT and that it has a long history of operations in the central Ohio area and was not created for purposes of this transaction. CUOH says that it entered into this transaction to expand its operations as part of the OHCR system. According to CUOH, the transaction will enable it to gain additional business opportunities, enhancing the efficiency of its current rail system.

In its response, CSXT states that it requested bids from several short line railroads as part of its ongoing network rationalization program and that it selected CUOH as the winning bidder because of that carrier's experience in meeting the needs of its customers. CSXT disputes UTU's claim that CUOH was not a logical choice to acquire the Lines, arguing that CUOH is an existing carrier with a proven record of providing service to shippers. CSXT notes that CUOH operates other rail lines that connect with the Lines and that CSXT and CUOH already interchange traffic.

CSXT denies that the transaction is intended to move jobs out from under its collective bargaining agreements with UTU. Rather, CSXT states that it entered into this transaction because it met CSXT's business goal of focusing its capital and other resources on rail lines that contribute in a meaningful way to its return on investment, and notes that the transaction also met CUOH's goal of expanding its services in Central Ohio. CSXT asserts further that whether a carrier is union or nonunion is not germane to any issues regarding line acquisitions under 49 U.S.C. 10902, the statutory provision that would apply if the class exemption at 49 CFR 1150, subpart E had not been promulgated.

CSXT disputes UTU's claim that it will retain significant control over CUOH's operations through the transaction agreements. CSXT asserts that it reached an arm's-length agreement with CUOH to acquire and operate the Lines, and notes that the provisions in its contractual arrangements with COUH are typical in this type of sale and lease of rail lines. According to CSXT, the transaction here is one of many line transactions that it has entered into in the last 25 years as it focuses its business on operations that make the most business sense. See, e.g., Central Railroad Company of Indianapolis–Lease and Operation Exemption–CSX Transportation Inc., STB Finance Docket No. 34508 (STB served July 30, 2004); M&B Railroad L.L.C.–Acquisition and Operation Exemption–CSX Transportation Inc., STB Finance Docket No. 34423 (STB served Nov. 20, 2003); R.J. Corman Equipment Co., LLC–Acquisition

Exemption—Lines of CSX Transportation, Inc., STB Finance Docket No. 34386 (STB served Sept. 12, 2003).

CSXT acknowledges that it is the primary source of cars for CUOH, and states that this is not unusual in the industry, pointing out that short line railroads often rely on the Class I railroad they interchange with for cars. According to CSXT, the agreement between CSXT and CUOH does not obligate CSXT to provide cars to CUOH and does not preclude CUOH from acquiring cars itself.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), we may revoke an exemption, in whole or in part, if we find that regulation of a transaction is necessary to carry out the RTP in 49 U.S.C. 10101. To justify revocation, petitioners must demonstrate reasonable, specific concerns addressing the need for regulation. Wisconsin Central Ltd.—Exemption Acquisition and Operation—Certain Lines of Soo Line Railroad Company, Finance Docket No. 31102 (ICC served July 28, 1988); Minnesota Comm. Ry., Inc.—Trackage Exempt.—BN RR. Co., 8 I.C.C.2d 31 (1991) (Minnesota); I&M Rail Link LLC—Acquisition and Operation Exemption—Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway, STB Finance Docket No. 33326 *et al.* (STB served Apr. 2, 1997), *aff'd sub nom. City of Ottumwa v. STB*, 153 F.3d 879 (8th Cir. 1998). Petitioners have failed to make the requisite showing here.

There is no merit to petitioners' assertion that the transaction should be considered under 49 U.S.C. 11323 and 11324, rather than section 10902. Section 10902 was enacted in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, as a means of facilitating the acquisition or operation of additional lines by small, Class II or Class III railroads. Transactions involving acquisitions by Class III carriers under section 10902 can be handled under the class exemption at 49 CFR 1150, subpart E. See Indiana & Ohio Railway Company—Acquisition Exemption—Lines of the Grand Trunk Railroad Inc., STB Finance Docket No. 33180 (STB served Feb. 3, 1997). CUOH, a Class III carrier, properly invoked the procedures of the class exemption, and provided all of the required information in its notice of exemption. The fact that CSXT has entered into some other arrangements with other small railroads on other parts of its system, without more, does not mean that these separate transactions should be deemed to be a single, larger transaction under sections 11323 and 11324.

Similarly, petitioners have provided no evidence to support their claim that this transaction has regional or national transportation significance. At issue here is the lease and operation of 120.35 miles of rail lines in central Ohio that apparently generate only a limited amount of traffic. The transaction does not deprive the region of service from major carriers because both CSXT and Norfolk Southern Railway Company will continue to operate in the central Ohio area. As for shippers located along the Lines, we credit CUOH's commitment to provide good service as a smaller carrier that can respond to local shippers' needs more easily than a larger carrier, such as CSXT, which serves a large portion of the United States. No shipper has raised concerns about this transaction in the record before us in this proceeding.

This transaction is in essence no different than many others that have routinely been approved by the Board for many years. See, e.g., Kaw River Railroad, Inc.–Acquisition and Operation Exemption–The Kansas City Southern Railway Company, STB Finance Docket No. 34509 (STB served May 3, 2005) (Kaw River); Port of Pend Oreille D/B/A Pend Oreille Valley Railroad–Acquisition and Operation Exemption–The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33561 (STB served Oct. 23, 1998) (Pend Oreille); Portland & Western Railroad, Inc.–Lease and Operation Exemption–Lines of Burlington Northern Railroad Company, STB Finance Docket No. 32766 (STB served Oct. 15, 1997, and Feb. 24, 1998) (Portland & Western). Larger railroads have shed many of their lighter density lines and have focused more of their resources on their main line service, improving their financial health, as we noted in Meridian Southern Railway, LLC–Acquisition and Operation Exemption–Line of Kansas City Southern Railway Company, STB Finance Docket No. 33854 (STB served Aug. 29, 2000). Service has not been degraded because short line railroads have been able to fill in the gaps where Class I railroads no longer provide service. Indeed, in Buckingham Branch Railroad Company–Lease–CSX Transportation, Inc., STB Finance Docket No. 34495 (STB served Nov. 5, 2004) (Buckingham Branch), another recent case in which a small carrier took over operation of a CSXT line, numerous shippers indicated that they welcomed having CSXT replaced by a smaller carrier that would pay more attention to their needs. As in Buckingham Branch, CSXT has decided to focus its capital and other resources on more economically justified rail lines and has selected CUOH as the successful bidder to provide service on the Lines. This transaction will enable CSXT to concentrate its resources on its other lines, while enabling CUOH to expand its operations and provide local service to shippers on the Lines. Petitioners have not shown how this transaction differs from those many previous transactions, including Buckingham Branch, that we have approved.

Petitioners offer no convincing evidence or argument to support their assertions that revocation of the exemption is necessary to carry out the RTP, particularly the directive regarding the impact on rail labor. And we see no basis for finding that labor impacts of this transaction warrant further regulatory inquiry. As noted, CUOH has informed local CSXT employees that it expects to hire additional employees for its expanded operations. The new jobs would be created with an existing carrier that is part of a system that has operated rail lines in the area for many years. Petitioners have not shown that the labor impact here is different in character from, or greater than, the impacts typically associated with acquisitions by Class III carriers. Petitioners have not rebutted either the presumption in section 10902(c) that this transaction is consistent with the public convenience and necessity, or the presumption reflected in the class exemption that this acquisition does not warrant detailed Board scrutiny to carry out the RTP. See Kaw River.

Nor have petitioners shown that the transaction is merely a device to move jobs out from under a collective bargaining agreement to a nonunion carrier, as the unions suggest. The record shows that CSXT and CUOH are unrelated companies that negotiated a legitimate arm's-length transaction meant to realize each carrier's reasonable business goals. As noted, CSXT will be

able to focus its capital and other resources on more economically justified rail lines, while CUOH, a Class III carrier that has been operating over the C&N Subdivision since 1992 and, along with the OHCR family of short line carriers, has been serving the central Ohio area for a number of years, will be able to expand its operations to serve additional customers in the area, consistent with its business goals and those of its corporate family. See Kaw River. Additionally, there is nothing in the record indicating that CUOH intends to abandon the Lines, and we note that the more relaxed abandonment procedure that has been proposed in STB Ex Parte No. 647 (cited by petitioners) has not been adopted and remains pending. We find no evidence suggesting that abandonment of the Lines is likely because of this transaction.

We do not agree with petitioners that this transaction is a sham resembling that disallowed in Sagamore. In that proceeding, our predecessor, the Interstate Commerce Commission, rejected a proposed transaction because a carrier with a collective bargaining agreement purported to “sell” its lines to a newly created carrier that actually was controlled by the same owners. The evidence indicated that the seller and buyer shared the same address, as well as the same president, other officers, and members of their boards of directors. In contrast, the record here shows that CUOH was not created for this transaction, that CUOH and CSXT are separate, financially independent entities with no common management, and that the transaction was motivated by the carriers’ desires to realize legitimate business goals. See Portland & Western (STB served Oct. 15, 1997); Kaw River.

Similarly, we find no merit to UTU’s assertions that CSXT has retained too much control over the Lines and their operation under the terms of the transaction agreements. The agreements resulted from arm’s-length negotiations by willing and experienced carriers, and the terms of the agreements appear to be typical for these types of short line railroad transactions. See, e.g., Kaw River. Both CUOH and CSXT agree that the restrictions and limitations imposed on CUOH in the lease agreement are provisions normally found in real estate leases, and that the rights retained by CSXT protect CSXT’s property interest. And provisions giving CSXT responsibility for car supply and administrative functions, such as collection and billing of freight charges, are common in the industry. See Pend Oreille. Finally, we agree that CSXT’s retained rights do not interfere with CUOH’s common carrier rights to operate the Lines.

In sum, having reviewed all of the evidence and arguments by the parties, we find no basis for revocation. Petitioners have failed to demonstrate that regulation of this transaction is needed to carry out the RTP. Thus we deny the petitions to revoke.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BLET’s and UTU’s petitions to revoke the exemption in this proceeding are denied.

2. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey. Commissioner Mulvey dissented with a separate expression.

Vernon A. Williams
Secretary

COMMISSIONER MULVEY, dissenting:

I dissent from the Board's decision in this case. I find that the lease agreement between the Columbus & Ohio River Rail Road Company (CUOH) and CSX Transportation (CSXT) includes fundamentally anti-competitive provisions, arguably circumvents labor protections, and should not qualify for consideration under our exemption process. I would have revoked the exemption and required the railroad to file a formal application with the Board so that these matters could have been explored to the fullest.

The lease agreement at issue includes a variety of provisions which greatly limit the ability of the acquiring railroad to operate as a truly independent carrier, not the least of which are restrictions on interchange known as paper barriers. In addition, labor has charged that this transaction allows CSXT to circumvent its contractual agreements with its employees. Requiring CSXT to submit a full application would have afforded the parties the opportunity to provide the Board with more evidence on these and other possible anti-competitive effects of the lease.

Moreover, the class exemptions, such as the one invoked by CSXT in this case, were originally designed to facilitate the non-controversial and relatively minor streamlining of the nation's rail network to allow for a more rationalized system. But as Class I carriers continue to use these exemptions to shave off thousands of miles of track by subdividing their downsizing into smaller transactions, the Board should more regularly require full applications to allow for complete review of the transactions and their potential impact on railroad employees, rail shippers, and the national transportation system. While I would prefer not to interfere with contracts between private parties, I believe that the Board must do so when contractual provisions run counter to key elements of our national transportation policy and the broader public interest as a whole.